IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 61/2006

Shri Yeshwant Mandrekar. ..... Appellant.

V/s.

1. Smt. Sunita Naik alias Sunita Mandrekar and another. ..... Respondents.

Mr. M.P. Amonkar, Advocate for the appellant.

Mr. Anthony X. Rebello, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 13th November, 2006.

P.C.

Heard learned Counsel for both the parties. Perused the record. The appellant-defendant has preferred this appeal against the Judgment and Order passed by the Addl. District Judge, South Goa, Margao, dismissing his appeal and confirming the Judgment and Order passed by the Civil Judge, Jr. Division, Vasco da Gama, Goa, decreeing the plaintiffs'/respondents' suit for mandatory injunction for the purpose of removal of two laterite stone pillars from the northern side and to demolish the two newly erected laterite stone pillars covered with zinc sheets towards the northern side of the

dwelling house and for demolition of illegal construction of the bottom ground floor with cement flooring and restore the land to its original condition within specific period.

2. The plaintiffs came with a case that they were owners in possession of the plot No.2 admeasuring admeasuring 2754 sq. metres at Vasco. The said plot No.2 forms 1/5th of the entire property called "Maimolem" bearing Matriz No. 764, surveyed under Nos. 78 to 86, 88 to 100, 102, 103 and 110 of P.T. Sheet No. 121, Chalta No. 1 to 21 to P.T. Sheet No.130, referred to as the "suit plot". In the suit plot there exists a dwelling house bearing registration No.4, admeasuring 25 sq. metres occupied by the defendant on lease basis. The defendant signed a declaration stating that the structure of the dwelling house would be taken away as and when the late father of the plaintiff No.1 was in need of the said premises or the area for his personal use. However, on 16.1.1998, the defendant brought a load of laterite stones, constructed the pillars on the northern side of his dwelling house, making encroachment in the said property. Hence, the suit for mandatory injunction. The defendant contested the suit, inter alia, denying the allegations and submitting that the allegations are false and the pillars existed since prior to the lease deed and as such, the suit was sought to be dismissed.

3. The learned trial Judge, after hearing both the parties and on the basis of the available evidence, came to the conclusion that the plaintiffs had proved that the defendant had encroached upon the property and made illegal construction of pillars and, as such, the suit for mandatory injunction came to be decreed. An appeal was carried to the District Court. The learned Addl. District Judge, South Goa, Margao, after hearing both the parties, concurred with the findings recorded by the trial Court and dismissed the appeal. Hence, the present second appeal.

4. The only question sought to be raised by the learned Counsel for the appellant at this stage is in respect of the alleged infringement of Order VII, Rule 3 of the Code of Civil Procedure. The learned Counsel submitted that where the suit was for removal of the alleged illegal construction which was made by encroaching over the property, it was incumbent upon the plaintiffs-respondents to file a sketch of the encroachment along with the plaint and the Court was not justified in substituting its own report to the requirements of the said provision.

5. It is to be noted that admittedly no sketch of the encroached portion of the property is annexed to the plaint. However, the trial Judge

issued notice dated 27.1.1998 and directed the Bailiff of the Court to take measurement of the alleged new construction and photographs and submit the detailed report of the status of the said construction. Accordingly, the Bailiff filed his report after visiting the construction site along with the plaintiff and the photographer and found that two poles of laterite stones built of the height of 2.6 feet and the length between to poles was 13 feet. In other words, the Bailiff report reveals that the plaintiffs' allegations had merit. The learned Counsel for the appellant submitted that the said report could not have been read in evidence and at any rate, the same could not be substituted for requirement of provision of Order VII, Rule 3 of the C.P. Code. However, in this regard, it must be noted that it is well settled that though provision of Order VII, Rule 3 of C.P. Code requires that plaint shall contain description of the property sufficient to identify it and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. The Bombay Amendment to the said provision stipulates that under such circumstance, where the case is that of encroachment, a sketch showing as approximately as possible the location and extent of encroachment shall also be filed along with the plaint. However, non-compliance of this provision, in my considered view, cannot be said to be infringement of the said provision as the surrounding circumstances are sufficient to show that

the property is identified by the evidence on record. Moreover, it is an admitted position that the state of facts, as reported by the Bailiff, whose evidence amounts to evidence of Court Commissioner, was proper and correct. Even, non-compliance with the provision of Order VII, Rule 3 of C.P.Code would not be fatal to the case of the plaintiffs when the defendant himself has admitted in the witness box the document Exhibit 29-colly and has identified the property in his cross examination.

6. Be that as it may, there is no substantial question of law involved in this matter and both the Court are seen to have appreciated the entire evidence in proper perspective and, therefore, I am of the view that the appeal is devoid of any merit and as such, stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.